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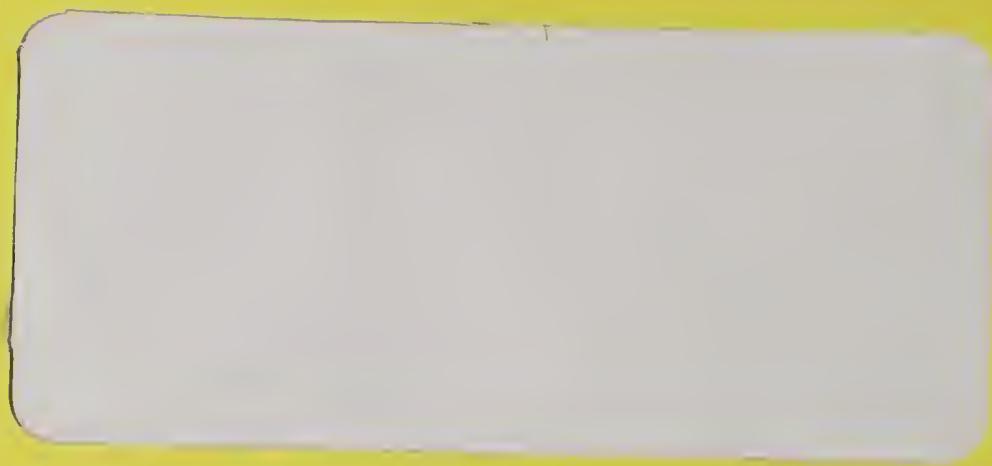


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FAMILY LAW: CASES AND MATERIALS

Edited by
Richard ✓
R. J. GATHERCOLE

VOLUME 2



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FACULTY OF LAW
UNIVERSITY OF TORONTO

FAMILY LAW: CASES AND MATERIALS

Edited by
R. J. GATHERCOLE

October, 1979

VOLUME 2

The materials produced
are intended for the sole
use of the students of the
FACULTY OF LAW, UNIVERSITY OF
TORONTO

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CHAPTER 6CUSTODY

Disputes between parents involving custody of children can arise in three ways:

- (a) As a corollary matter to a divorce application under The Divorce Act (ss. 10 & 11),
- (b) On an application for custody under s. 35 of the Family Law Reform Act,
- (c) On an application under The Infants Act.

Prior to the enactment of the Family Law Reform Act, in the absence of divorce proceedings, the custody disputes were traditionally dealt with under The Infants Act by either the Supreme Court of Ontario or the Surrogate Court. While this avenue still exists, the repealing of the sections of The Infants Act relating to maintenance orders (s. 80(1)(a) of the Family Law Reform Act) likely will mean that most, if not all, applications will not be brought under the Family Law Reform Act joined with an application under Part II for support. Additionally, the fact that applications for support and custody under the Family Law Reform Act can be brought in the Provincial Court (Family Division) as well as in the Supreme and County Courts make resort to that Act more appealing.

Parents who have separated can, of course, enter into a separation agreement providing for custody of, and access to, the children of the marriage (s. 53 F.L.R.A.). Note, however, that provisions respecting custody of and access to children are expressly prohibited from inclusion in marriage contracts and cohabitation agreements (ss. 51 & 52, F.L.R.A.).

EXCERPTS FROM: The Best Interests of the Child in Custody
Controversies Between Natural Parents:
Interpretations and Trends

Barker, E.L. and Hamman, C.L.,
Washburn L.J., 1979, v. 18, no. 3
482-498

"Where the [custody] issue is between parents of a child the primary question for determination is what serves the interest and welfare of the child, and all other questions are subordinate."¹ The best interest of the child is a vague rule. Commentators question whether the rule's application merely substitutes for deeper investigation of difficult custody dispute issues.²



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CHAPTER 8ADOPTION

Prior to the coming into force of The Child Welfare Act, 1978 (on June 15, 1979) adoption proceedings took place primarily in the County and District Courts, although the Supreme Court has jurisdiction to hear adoptions. Under Part III of the new Act these proceedings take place in either the Provincial Court (Family Division), or the Unified Family Court (s. 1(c)).

Private placement adoptions, without the intervention of the Children's Aid Society, were not uncommon in Ontario. These were often arranged by a lawyer or physician, but there was no limitation on who could effect private placements or any regulation or licencing provisions. Under The Child Welfare Act, 1978, private adoption agencies and individuals who wish to place children privately must be licensed by the Minister of Community and Social Services (sections 59-60).

THE CHILD WELFARE ACT, 1978**PART III****ADOPTION**

59.—(1) In this Part and Part IV,

(a) "adoption agency" means a corporation without share capital having objects of a charitable nature,

(i) to which Part III of *The Corporations Act* applies, or

(ii) that is incorporated under a general or special Act of the Parliament of Canada,

and that places children under eighteen years of age for adoption and includes a society;

(b) "licence" means a licence issued under this Act;

(c) "relative of the child" means a grandparent, uncle or aunt of the child, whether the relationship is of whole blood, half blood or by marriage, and notwithstanding that the relationship is traced through or to a person born outside marriage or that the relationship depends on the adoption of any person. R.S.O. 1970, c. 64, s. 69, *amended*.

(2) In this Part, "child" means a person whether under eighteen years of age or eighteen or more years of age.

60.—(1) No person other than a society shall establish, operate or maintain an adoption agency except under the authority of a licence issued by a Director under this Act.

